

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

COLLEEN PATRIDGE-STAUDINGER and
RICHARD A. FLAIZ, M.D.,
Defendants.

No. CR-12-6043-FVS-1
No. CR-12-6043-FVS-2

ORDER DENYING MOTION TO
DISMISS

THIS MATTER came before the Court on January 11, 2013, based upon the defendants' motion to dismiss. Colleen Patridge-Staudinger was represented by James E. Egan. Richard A. Flaiz, M.D., was represented by William D. McCool. The government was represented by Alexander C. Ekstrom.

BACKGROUND

A number of allegations are set forth below. The Court has drawn them from the Indictment. The Court expresses no opinion with respect to their accuracy. After all, allegations are just that -- allegations. It remains to be seen whether the government can prove any of them.

The government alleges dysport and xeomin are prescription drugs. They can be injected under a person's skin in order to treat wrinkles. Colleen Patridge-Staudinger is licensed to engage in the practice of

1 esthetics in the State of Washington. On a number of occasions during
2 2011 and 2012, she obtained either dysport or xeomin from Richard A.
3 Flaiz, M.D., at his office in the State of Oregon. Acting pursuant to
4 his instructions, she brought the drugs into the State of Washington
5 and injected them into patients in order to eliminate wrinkles.

6 Dr. Flaiz is licensed to practice medicine in the State of
7 Oregon, but not in the State of Washington. In the government's
8 opinion, he violated federal law by directing Mrs. Patridge-Staudinger
9 to administer the injections that are described in the Indictment, and
10 she violated federal law by administering them. The government's
11 opinion is based, in part, upon provisions that are set forth in 21
12 U.S.C. § 353(b)(1)(C) and 21 U.S.C. § 331(k). It is useful to begin
13 with § 353(b). A drug which is covered by that paragraph "shall be
14 dispensed only . . . upon a written prescription of a practitioner
15 licensed by law to administer such drug," 21 U.S.C. §
16 353(b)(1)(C). "The act of dispensing a drug contrary to the
17 provisions of this paragraph shall be deemed to be an act which
18 results in the drug being misbranded while held for sale." *Id.* The
19 Eighth Circuit summarized § 353(b)(1)(C) in *United States v. Smith*,
20 573 F.3d 639 (8th Cir.2009). "A drug is 'misbranded,'" said the
21 Eighth Circuit, "unless dispensed upon a 'prescription of a
22 practitioner licensed by law to administer such drug.'" *Id.* at 650
23 (quoting 21 U.S.C. § 353(b)(1)(C)). The government alleges Dr. Flaiz
24 was not licensed to prescribe the injections that are described in the
25 Indictment. It follows, says the government, that Mrs. Patridge-
26

1 Staudinger was not authorized to administer them. Consequently,
2 according to the government, Dr. Flaiz and Mrs. Patridge-Staudinger
3 misbranded the injections she administered. Misbranding a drug is
4 unlawful. 21 U.S.C. § 331(k).

5 On August 14, 2012, a grand jury returned an indictment charging
6 Mrs. Patridge-Staudinger and Dr. Flaiz with one count of conspiracy to
7 misbrand prescription drugs, 18 U.S.C. § 371, and four counts of
8 misbranding prescription drugs, 21 U.S.C. § 353(b)(1). The defendants
9 move to dismiss the indictment. They argue the government has
10 misstated the law. According to them, Dr. Flaiz was authorized to
11 supervise Mrs. Patridge-Staudinger in the State of Washington.

12 **RULE 12(b)**

13 The defendants are bringing their motion to dismiss under Federal
14 Rules of Criminal procedure 12(b)(2) and 12(b)(3)(B). Rule 12(b)(2)
15 states, "A party may raise by pretrial motion any defense, objection,
16 or request that the court can determine without a trial of the general
17 issue." However, neither Rule 12(b)(2) nor any other Federal Rule of
18 Criminal Procedure authorizes a motion for summary judgment in a
19 criminal case. *United States v. Jensen*, 93 F.3d 667, 669 (9th
20 Cir.1996) (citing *United States v. Critzer*, 951 F.2d 306, 307 (11th
21 Cir.1992) (per curiam)). Thus, when a defendant moves to dismiss
22 based upon the government's alleged inability to prove an element of
23 the charge, a district court must determine whether the issue raised
24 by the defendant's motion is "entirely segregable from the evidence to
25 be presented at trial." *United States v. Shortt Accountancy Corp.*,
26

1 785 F.2d 1448, 1452 (9th Cir.), (internal punctuation and citations
2 omitted), *cert. denied*, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715
3 (1986). If resolution of the motion "is substantially founded upon
4 and intertwined with evidence concerning the alleged offense, the
5 motion falls within the province of the ultimate finder of fact and
6 must be deferred." *Id.* (internal quotation and citations omitted).

7 The defendants are also relying upon Rule 12(b)(3). It states in
8 pertinent part, "[A]t any time while the case is pending, the court
9 may hear a claim that the indictment or information fails . . . to
10 state an offense." The Court's inquiry under Rule 12(b)(3)(B) is
11 "narrow." *United States v. Moore*, 563 F.3d 583, 586 (7th Cir.2009).
12 When determining whether an indictment states an offense, a court "is
13 bound by the four corners of the indictment . . .[, and] "must accept
14 the truth of the allegations in the indictment[.]" *United States v.*
15 *Boren*, 278 F.3d 911, 914 (9th Cir.2002) (citations omitted). "An
16 indictment fails to state an offense if the specific facts alleged in
17 it 'fall beyond the scope of the relevant criminal statute, as a
18 matter of statutory interpretation.'" *United States v. Vitillo*, 490
19 F.3d 314, 321 (3d Cir.2007) (quoting *United States v. Panarella*, 277
20 F.3d 678, 685 (3d Cir.2002)).
21

22 ANALYSIS

23 A drug that falls within the scope of § 353(b) "shall be
24 dispensed only . . . upon a written prescription of a practitioner
25 licensed by law to administer such drug," 21 U.S.C. §
26 353(b)(1)(C). The preceding provision does not expressly require a

1 practitioner to be licensed in the state in which a regulated drug is
2 administered. Instead, it requires only that he be "licensed by law
3 to administer such drug." Dr. Flaiz is licensed to practice medicine
4 in Oregon. The government acknowledges he is licensed to prescribe
5 dysport and xeomin injections in that state. The defendants maintain
6 Dr. Flaiz's authority to prescribe injections is not limited to
7 Oregon. In support of this contention, they cite RCW 18.71.030(6),
8 which permits:

9 The practice of medicine by any practitioner licensed by
10 another state or territory in which he or she resides,
11 provided that such practitioner shall not open an office or
12 appoint a place of meeting patients or receiving calls
13 within this state; . . .

14 The defendants allege Dr. Flaiz complied with RCW 18.71.030(6).
15 According to them, he did not open an office in the State of
16 Washington. Nor, as they view the record, did he establish a place in
17 Washington to meet patients. Nor did he receive calls in this state.
18 Thus, in the defendants' opinion, Dr. Flaiz did not exceed the
19 authority that is conferred by RCW 18.71.030(6).

20 The government rejects the defendants' interpretation of RCW
21 18.71.030(6). In the government's opinion, the statute does not
22 authorize Dr. Flaiz to supervise Mrs. Patridge-Staudinger's injections
23 in the State of Washington. The government's position is based, in
24 part, upon its reading of *State v. Tracy*, 158 Wn.2d 683, 147 P.3d 559
25 (2006). *Tracy* involved the Washington State Medical Use of Cannabis
26 Act, chapter 69.51A RCW. The defendant, Sharon Tracy, was charged

1 with manufacturing marijuana. 158 Wn.2d at 685-86. She attempted to
2 establish she was a "qualifying patient" within the meaning of chapter
3 69.51A and, thus, entitled to present a "compassionate use defense."
4 In order to do so, she had to demonstrate she was "a patient of a
5 physician licensed under chapter 18.71" 158 Wn.2d at 688.
6 Neither of the physicians who allegedly endorsed her use of marijuana
7 was licensed by the State of Washington. Both were licensed by other
8 states. As a result, the Washington Supreme Court had to decide
9 whether either physician was a "qualified physician" within the
10 meaning of chapter 69.51A. The Supreme Court ruled against Ms. Tracy.
11 In essence, the Supreme Court distinguished between two classes of
12 physicians. One class is composed of physicians who are formally
13 licensed by the State of Washington to practice medicine in this
14 state. The other class is composed of physicians who are formally
15 licensed by another state to practice medicine in that state, but who,
16 in certain limited circumstances, are permitted by the State of
17 Washington to practice medicine here. 158 Wn.2d at 689-90. Only
18 physicians who fall within the first class -- *i.e.*, physicians who are
19 formally licensed by the State of Washington -- are "qualified
20 physicians" within the meaning of chapter 69.51A. 158 Wn.2d at 690.
21 In reaching that conclusion, the state Supreme Court mentioned RCW
22 18.71.030(6), but did not attempt to establish its parameters. The
23 state Supreme Court's most extensive comment about RCW 18.71.030(6)
24 was this, "But the exception relied upon by Tracy does not include all
25 out-of-state physicians for every purpose; it merely permits out-of-
26

1 state physicians temporarily within the state, but without an office
2 or similar professional connections, to practice their calling while
3 in Washington." 158 Wn.2d at 690. The preceding statement does not
4 provide this Court with enough guidance to anticipate how the
5 Washington Supreme Court would respond to Dr. Flaiz's interpretation
6 of RCW 18.71.030(6), and the Washington Supreme Court is the
7 authoritative interpreter of state law. See *Golden West Refining Co.*
8 *v. SunTrust Bank*, 538 F.3d 1233, 1237 (9th Cir.2008) (diversity
9 jurisdiction). Perhaps the Washington Supreme Court would embrace Dr.
10 Flaiz's interpretation; perhaps not. This Court cannot be sure.

11 **RULING**

12 Dismissal is appropriate under Rule 12(b) only if the defendants
13 can identify a dispositive legal issue that is segregable from the
14 evidence which will be presented at their trial. This is not such a
15 case. The defendants maintain RCW 18.71.030(6) authorized Dr. Flaiz
16 to supervise Mrs. Patridge-Staudinger. In order to prevail, they must
17 demonstrate that he did "not open an office or appoint a place of
18 meeting patients or receiving calls within this state[.]" Those are
19 factual issues. Absent a stipulation of facts (and there is none),
20 the Court cannot exclude the possibility that Dr. Flaiz's actions fell
21 outside the scope of RCW 18.71.030(6). Since the legal issue that the
22 defendants have raised cannot be segregated from the evidence that
23 will be presented at trial, and since it is unclear whether the
24 Washington Supreme Court would adopt Dr. Flaiz's interpretation of RCW
25 18.71.030(6), the defendants are not entitled to dismissal prior to
26

1 trial under Rule 12(b). This is a narrow ruling. The Court is not
2 ratifying the government's decision to charge the defendants with
3 crimes (as opposed to seeking a non-criminal resolution of the
4 dispute), nor is the Court indicating the government will be able to
5 avoid a motion to dismiss under Federal Rule of Criminal Procedure 29.
6 That remains to be seen. All the Court is saying is this: Given the
7 existence of material factual disputes, given the lack of an
8 authoritative interpretation of Washington law, and given the
9 constraints imposed by Rule 12(b), the defendants' motion to dismiss
10 must be denied.

11 **IT IS HEREBY ORDERED:**

12 The defendants' "Motion to Dismiss Indictment" (**ECF No. 31**) is
13 denied.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 14th day of January, 2013.

17
18 s/ Fred Van Sickle
19 Fred Van Sickle
20 Senior United States District Judge
21
22
23
24
25
26